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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of WILLIAM C. and
WENDI B. GIFFORD.

WILLIAM C. GIFFORD, JR.,

Appellant,

v.

WENDI B. GIFFORD,

Respondent.

G040409

(Super. Ct. No. 97D005174)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas H. Schulte, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Vincent L. Goodwin for Appellant.

No appearance for Respondent.

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The court did not abuse its discretion when it modified the child custody order. The court found the circumstances had changed in that the parents developed a state of extreme conflict. One of their children was diagnosed with a crippling disease which requires medical decisions and many of their disagreements and difficulties concern his disease. We affirm.

I

FACTS

Appellant William C. Gifford, Jr., contends the trial court abused its discretion when it modified the custody order. Respondent Wendi B. Gifford did not file a brief.¹ They have two children, a girl, H., born in 1994 and a boy, T., born in 1997

On October 26, 2005, the court ordered joint legal and physical custody of the parties' two minor children pursuant to their stipulation. The order/stipulation provided the parents would "share custodial timeshare on a week on week off basis." It also provided that William attend 30 hours of parenting classes and five hours of therapy "to assist him with anger, lack of desire to communicate and cooperate" with Wendi. Wendi was to "continue to be treated by Dr. Green and will continue to take antipseudomonal antibiotics" and "continue therapy" and "attend 2 AA meetings a week."

At a July 25, 2007 hearing, the court noted: "The court is quite concerned about what it has observed in this process. Not only in the debate that the parties are having, but in the way that the debate is acted out. The demeanor of the parties toward one another, and the concern that the circumstances have come to a point where it's hard for me to visualize how particularly T[.], but very possibly both children, are going to survive the current arrangement, absent — even if we didn't have the medical issues. [¶] The record should reflect that the parties' demeanor, as far as their body language, it's clear to the court that the parties are extremely angry at one another."

¹ For clarity, we use the parties first names. No disrespect is intended.

Wendi filed an order to show cause relating to custody and visitation on August 23, 2007. She attached her declaration which states in part: “On July 11, 2007 I filed an Order to Show Cause, ex parte, regarding our son T[.] and his Perthes Disease² and the fact that Petitioner refused to discuss the issue with me or make a decision (other than to do nothing) regarding our son’s medical treatment. [¶] . . . [¶] Since being in court on July 24th and 25th, 2007 and after Commissioner Schulte made it clear to us that communication was a huge problem with us, Petitioner has continued to ignore me and refuse to communicate. Petitioner simply refuses to talk or e-mail, he refuses to communicate in any way with me. For example, H[.] is involved in soccer. Petitioner is in possession of H[.]’s original birth certificate. In order to enroll H[.] in Club Soccer I needed her birth certificate. I asked numerous times via e-mail and telephone messages to Petitioner for the original birth certificate. To this day, I have not received a response.” Wendi’s declaration also describes her frustration when she attempted to induce William into taking action when a “grown up male voice” was calling 13-year-old H. on the telephone. It further states Wendi thinks William “plans activities that T[.] cannot participate in, like the Wild Animal Park.” She says “T[.] cannot do anything right now, his pain level is at such an extreme that he is suffering constantly.”

William’s lawyer wrote a letter to Wendi’s lawyer on September 27, 2007 about William’s upcoming wedding. The letter stated in part: “My client would very much like his son to attend the Friday rehearsal and dinner, however, since your client still insists that T[.] cannot possibly survive an overnight anywhere but in his hospital bed, he was forced to make alternate plans due to time constraints and geography.”

The court conducted a lengthy hearing. During the hearing, an evaluation conducted under Evidence Code section 730 was referred to by the court: “Dr. Mann opined and observed that the parties are in an extreme state of conflict; that they do not

² In his brief, appellant describes this as “a rare crippling bone disease.”

communicate; that it is stressful to the children.” The court also quoted Dr. Mann: “If Bill’s attitude does not change, and Wendi continues to maintain her sobriety, it will be more likely she will be the primary caretaker.”

On November 26, 2007, the court stated: “We have two parents who care deeply for the children, love them very much. Want to do the best for them . . . but they have different parenting styles. They have difficulties in communicating between themselves, and even after all of the years of that have gone by the problems have not gotten any better. In fact, primarily as a result of medical difficulties of T[.], the problems have probably gotten worse. [¶] So the court finds that there has been a significant change of circumstances by the failure of the expectations of the permanent order, and made even more evident by the medical condition of T[.]”

In its minute order, the court found “there has been a substantial change in circumstances, in that the expectations which were set as a result of the last order have not been met.” The court modified “the custodial arrangement to allow for Respondent (Mother) to have physical custody, with Petitioner (Father) having as much practical time with the minor children as possible.” The court ordered: “Petitioner (Father) shall have visitation with the minor children on the first, second and fourth weekends of every month. Court defines a weekend as beginning on Fridays after school as soon as the Petitioner is available to the children. Petitioner may have his wife or other family member pick-up the minor children for him from the home of the Respondent. The weekend shall be defined as ending on Monday morning return to school. [¶] In the event there is a Monday holiday, and the parent enjoying the adjoining weekend is Petitioner (father), the visitation shall be extended to return to school on Tuesday morning. [¶] For the summer, Court orders parties shall go to a two-week-on/two-week-off arrangement with the minor children, with Petitioner (Father) receiving the first two weeks. All exchanges shall occur on Friday afternoons. [¶] The Christmas schedule shall remain as previously ordered. [¶] Court orders that parties shall essentially have joint

legal custody, with the one exception as it pertains to the issues concerning T[.]’s medical condition. On that sole issue, Respondent (Mother) must consult with Petitioner, who may talk with the doctors, and if no agreement can be reached, then Respondent (Mother) shall have the authority to make the ultimate decision. Should Petitioner feel that the decision made by Mother is detrimental to the child, he is free to file for a hearing before this court. In all other regards, joint legal custody applies.”

II

DISCUSSION

William contends he was deprived of his right to due process when the court denied his request for a continuance because he was unable to assist his lawyer in preparing for the modification hearing while he was out of town on his prepaid honeymoon vacation. Since he provides no legal authority for this proposition, we deem it to be waived. (*Roden v. AmerisourceBergen Corp.* (2007) 155 Cal.App.4th 1548, 1575-1576.)

He also contends the court abused its discretion when it “modified a two year old joint custody order in the absence of changed circumstances.” The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. Under this test, the reviewing court must uphold the trial court’s ruling if it is correct on any basis, regardless of whether such basis was actually invoked. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) Moreover, under the so-called rule of changed circumstances, a party seeking to modify a permanent custody or visitation order can do so only if he or she demonstrates changed circumstances justifying a modification. (*Id.* at p. 256.) In other words, the trial court should preserve the status quo unless a significant change in circumstances indicates that something different would be in the child’s best interest. (*Ibid.*)

“For purposes of an initial custody determination, [Family Code] section 3040, subdivision (b), affords the trial court and the family “the widest discretion to

choose a parenting plan that is in the best interest of the child.” [Citation.] When the parents are unable to agree on a custody arrangement, the court must determine the best interest of the child by setting the matter for an adversarial hearing and considering all relevant factors, including the child’s health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child’s contact with the parents. [Citations.] [¶] Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, ‘the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining’ that custody arrangement. [Citation.] In recognition of this policy concern, we have articulated a variation on the best interest standard, known as the changed circumstance rule, that the trial court must apply when a parent seeks modification of a final judicial custody determination. [Citations.] Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates ‘a significant change of circumstances’ indicating that a different custody arrangement would be in the child’s best interest. [Citation.] Not only does this serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy. [Citation.]” (*In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 955-956, fn. omitted.)

“Under the changed circumstance rule, after the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, custody modification is appropriate only if the parent seeking modification demonstrates “‘a significant change of circumstances” indicating that a different custody arrangement would be in the child’s best interest.’ [Citation.]” (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1072.)

Here the court conducted an adversarial hearing. There was evidence T. was diagnosed with Perthes disease in March 2007. Wendi testified about her unsuccessful attempts to discuss T.'s treatment alternatives with William. She said when surgery was recommended she tried to communicate with William and got no response.

The court found the communications problems between the parents have gotten worse, and "circled around the issue of T[.]'s physical or medical condition." The court stated: "[T]he medical problems significantly ha[ve] made the need for the parties to communicate even greater than their need to communicate when the joint custody arrangements were adopted" in the permanent order. In its ruling, the trial court noted that T[.]'s condition would be ongoing, "probably the rest of his life." The court said it was in the best interests of the children that Wendi "make the ultimate decisions regarding the management of T[.]'s disease and his medical care." Under these circumstances, we cannot find the trial court abused its discretion.

III

DISPOSITION

The findings and orders of the court are affirmed. Appellant shall bear his own costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.